

PUBLIC PROSECUTOR

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v.

LAI KON CHING & ANOR

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK B. HJ. ISHAK J.
[CRIMINAL TRIAL NO. PCT 58 - 2 - 83]
5 OCTOBER 1994

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DANGEROUS DRUGS: Trafficking in cannabis - Definition of cannabis - Evidence of government chemist - Whether chemist must specifically define cannabis as statutorily defined - s. 2 Dangerous Drugs Act 1952 - Whether failure to give statutory definition could lead to inference as Indian Hemp - Inference most favourable to accused - Whether possession of Indian Hemp could activate s. 39B or s. 12(2) and punishable under s. 12(3) of the said Act.

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CRIMINAL PROCEDURE: Section 158(i) of the Criminal Procedure Code - Court to alter or add to charge - Whether imperative on part of Court to add to or alter charge.

EVIDENCE - Common intention - s. 34 of Penal Code - Whether there was common intention of both accused persons to commit offence of trafficking in dangerous drugs.

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In this case, both the accused persons were charged with trafficking in dangerous drugs, to wit, cannabis weighing 480 grammes on 5 May 1992 at about 11.00 p.m. at kawasan sebuah pondok, tempat pemungutan susu getah MARDEC, Salak Utara, in the district of Sungai Siput Utara, an offence under s. 39B (1) (a) of the Dangerous Drugs Act, 1952 read with s. 34 of the Penal Code and punishable under s. 39B(2) of the said Act.

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Held:

[1] The term cannabis as adverted to by Miss Lam Yoke Ching, the government chemist could refer to Indian Hemp and that being the case, the Court had no choice but to construe it as such. In the circumstances, the charge against both the accused persons was amended to one of possession under s. 12(2) of the Dangerous Drugs Act, 1952 read with s. 34 of the Penal Code and punishable under s. 12(3) of the said Act.

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[2] As the first accused had pleaded guilty to the amended charge and understood the nature and consequences of his plea, he was convicted thereof. The second accused claimed trial and gave a statement from the dock. By necessary inference, the second accused had a common intention to commit the offence with the first accused and that would, by itself be sufficient to import liability on him. The second accused was convicted on the amended charge.

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[Charge amended to one of possession of Indian Hemp under s. 12(2) of Dangerous Drugs Act, 1952 read with s. 34 of Penal Code. Both accused persons convicted and sentenced to five (5) years' imprisonment with effect from the date of their arrest.]

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a Cases referred to:

Wong Yew Ming v. Public Prosecutor [1991] 1 MLJ 31 SC / [1990] 2 CLJ 946 (*refd*)

Public Prosecutor v. Roslim bin Harun [1993] 3 CLJ 505. (*refd*)

Lee Toon Choy & Ors v. P.P [1948-49] MLJ Supp 167. (*refd*)

Mahbub Shah v. King - Emperor [1945] AIR PC 118. (*redf*)

Leow Nghe Lim v. Reg [1956] 22 MLJ 28. (*refd*)

b *Tai Chai Keh v. P.P.* [1948-49] MLJ Supp. (*refd*)

P.P. v. Heng You Nang [1949] MLJ 285. (*refd*)

P.P. v. Tan Kim Kang [1962] MLJ 388. (*refd*)

Lim Tuan Hong v. Jebson [1985] 4 Ky 79. (*refd*)

Singah Mohamed Hussin v. PP [1973] 2 MLJ 109. (*refd*)

Ip Ying Wah v. PP [1958] MLJ 34. (*refd*)

Kenneth John Ball [1951] 35 Cr. App. R. 164. (*refd*)

c *Mohd Jusoh bin Abdullah v. PP* [1947] 13 MLJ 131. (*refd*)

Reg v. Curran [1973] 57 Cr. App. R. 945 (*refd*)

Legislation referred to:

Dangerous Drugs Act 1952, ss. 39B (1) (a), 34, 39B (2), 12 (2), 12 (3), 158 (ii)

Penal Code, s. 34

For the public prosecutor - Murtazadi Amran, DPP

d *For the first accused - Gurbachan Singh; M/s. Bachan & Kartar, Jula Singh; M/s.*

Paramjit & Co.

For the second accused - Kumaraendran; M/s. Kumar, Sitham & Co., Jula Singh; M/s.

Paramjit & Co.

JUDGMENT

e **Hj. Abdul Malik b. Hj. Ishak J:**

Both the accused persons were charged with trafficking in dangerous drugs, to wit, cannabis weighing 480 grammes at about 11.00 p.m. on 5 May 1992 at kawasan sebuah pondok, tempat pemungutan susu getah, MARDEC, Salak Utara, in the district of Sungei Siput Utara, Perak, an offence under s. 39B(1) (a) of the Dangerous Drugs Act 1952 (Act 234) ("Act") read with s. 34 of the Penal Code and punishable under s. 39B(2) of the same Act.

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Because of the stand which I have taken and which will presently be seen, I do not propose to go into detail in regard to the facts of the case.

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There were two previous transactions of the sale of dangerous drugs before 5 May 1992. The first previous transaction was on 25 March 1992 at about 6.45 p.m. at Mardec latex collection hut when the informer introduced Detective Corporal 70718 Busra bin Abdul Kadir (SP7) ("Busra") to the first accused and, out of this introduction, Busra purchased five (5) packets of ganja for RM25 from the first accused. The second previous transaction was on 2 May 1992 at 5.00 p.m. at the Mardec latex collection hut where the first accused introduced the second accused to Busra and it was the second accused that carried the three hundred (300) packets of ganja which was eventually handed by the first accused to Busra in exchange for RM1,500. It transpired later that only two hundred and ninety (290) packets of ganja was transacted.

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At these two previous transactions, Busra successfully played the role of an *agent provocateur* and immediately after each of these two previous transactions was completed, Busra briefed and handed the ganja to his superior officer in the person

of ASP Badaruddin bin Zafari (SP5) ("Badaruddin"). In short, Badaruddin monitored the role of Busra as an *agent provocateur* and whatever Busra did on these two previous transactions, Badaruddin was kept informed. Evidence of sale of dangerous drugs on previous occasions are certainly admissible as it would show knowledge or intention that the possession was not accidental (see *Wong Yew Ming v. Public Prosecutor* [1991] 1 MLJ SC as applied in *Public Prosecutor v. Roslim bin Harun* [1993] 3 CLJ 505). This was in fact the bone of the prosecutor's contention as the evidence that unfolded in the course of trial showed that the second accused in concert, right from the second previous transaction, with the first accused had common intention to commit the offence of trafficking 480 grammes of cannabis on 5 May 1992. There was, so submitted the learned deputy prosecutor, material evidence from which common intention can properly be inferred (see *Lee Yoon Choy and Ors. v. P.P.* [1948-49] MLJ Supp 167 quoting with approval *Mahbub Shah v. King-Emperor* [1945] AIR PC 118).

The final and crucial transaction was on 5 May 1992 where Busra arranged with the first accused and where the first accused agreed to sell two thousand (2,000) packets of ganja at the Mardec latex collection hut at about 11.00 p.m. After attending a briefing given by Badaruddin and attended by several other police personnel, Busra proceeded with ex-Detective Constable 70727 Chan Kok Wah (SP10) ("Chan") to the Mardec latex collection hut at about 10.55 p.m. in a motorcar bearing registration number ABB 538 driven by Busra. Like Busra, Chan too was directed not only to play the role of an *agent provocateur* but also to play the role of a "taukeh" to Busra. Upon arrival at the Mardec latex collection hut and after parking the motorcar ABB 538, both Busra and Chan waited patiently for the arrival of the first accused. Soon thereafter a proton saga car bearing registration number ABP 4610 arrived with the first accused at the wheel and the second accused as the passenger. Busra then introduced Chan to the first accused as: "Ini taukeh saya Chan" and the first accused shook hands and they started to converse in a chinese dialect whilst the second accused stood nearby in a pensive mood. It is pertinent to point out at this stage that Busra knew that the area had been surrounded by Badaruddin and the rest of the police personal that had earlier on attended the briefing. Suddenly, Busra heard Chan raising his voice - an apparent show of anger and told Busra curtly: "Bob balik." Busra also saw Chan showing some money to the first accused. Chan's behaviour caused the first accused to react rather positively. The first accused then took Busra in the proton saga car ABP 4610 to the basketball court and there Busra saw that the first accused took a black bag with a Pro-Sport insignia (P5B) and handed it to Busra who was waiting in the said car. Busra examined the contents of the black bag and found it to contain dried leaves believed to be cannabis and he then placed the black bag on the floor board of the front passenger seat of the proton saga. The first accused then drove the proton saga car to the Mardec latex collection hut where Chan and the second accused were waiting and, upon arrival, both Busra and the first accused alighted from the proton saga car. Busra moved closer to the second accused and he then shouted the code word for arrest, viz "OK" and at the same time placed his right hand across the neck of the second accused and managed, with the assistance of the other police personnel that had earlier waited in ambush, to subdue the second accused. Busra then proceeded back to the proton saga car and, it was at this time, that Busra saw the first accused flee from the scene. Chan took stock of the situation and fired one warning shot in the air. The first accused stood still and was rooted to the ground, so to speak. Without further

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a ado, Badaruddin pounced on the first accused and assisted by the other police personnel managed to arrest the first accused. Busra then took Badaruddin to the proton saga car and from the floor board of the front passenger seat, Badaruddin seized the black bag and examined its contents in the presence of both the accused persons. So much for the facts of the case.

b I have anxiously reviewed the available evidence and found Busra, Badaruddin and Chan to be excellent prosecution witnesses. Busra behaved as an exemplary prosecution witness - as cool as a cucumber. At this juncture, what Taylor J said in *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28 in regard to demeanour is worth quoting. His Lordship said:

c The Magistrate explained, with commendable care, his reasons for rejecting the evidence of the accused. He said the demeanour of the accused in the box was bad. It certainly was very bad but demeanour is a most unsafe guide. It sometimes happens that a perfectly honest man becomes confused and contradictory in the witness box whereas many rogues have excellent demeanour.

d With respect, what Taylor J said in that case cannot apply to Busra. One must see to believe how Busra withstood those onslaughts launched by the defence. I have taken the liberty to note the demeanour of Busra as the trial commences and I have nothing but praises for him.

e An interesting point of law arose amidst the evidence of the government chemist (SP4), Miss Lam Yoke Ching ("Lam"). In examination in chief, Lam categorically stated that: Cannabis is as defined in the Dangerous Drugs Act, 1952. This was also repeated and reflected in her chemist report (P10A). It was argued by the defence that Lam did not specifically say that the cannabis was as defined in s. 2 of the Dangerous Drugs Act, 1952 (where cannabis is statutorily defined as: "cannabis" means any part of any plant of the genus Cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated) and, consequently, the term cannabis as referred to by Lam may even refer to the term cannabis as specified in Part I and Part II of the First Schedule to the Act or even to Part III of the First Schedule to the Act. Of particular relevance and repeatedly stressed by the defence, the term cannabis as referred to by Lam may even be caught under Part III of the First Schedule to the Act where the term cannabis has been defined to mean:

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g Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp).

It was next argued that if the subject matter of the charge was in fact Indian Hemp, then both the accused persons could not be charged for trafficking in it. That was a novel proposition and my attention was drawn to the recent Supreme Court decisions vide Criminal Appeals numbers:

h 05-154-89 (*Mohamed bin Othman v. Public Prosecutor*)
05-138-89 (*Abdul Shukor bin Othman v. Public Prosecutor*)
05-137-89 (*Ismail bin Kassim v. Public Prosecutor*)
Mat Isa bin Ahmad v. Public Prosecutor
05-140-89 (*Kharmarudin bin Hashim v. Public Prosecutor*)
05-139-89 (*Mohd Ibrahim bin Marican bin M.B. Marican v. Public Prosecutor*)

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where their Lordships (coram: Tan Sri Eusoff Chin, Tan Sri Edgar Joseph Jr. and Datuk Wira Wan Yahya Pawan Teh) on 20 June 1994 held that the failure of the government chemist to define the term cannabis according to the definition in the Act was fatal as the dangerous drugs could be Indian Hemp which, if possessed, would not activate s. 39B but rather s. 12(2) of the Act and punishable under s. 12(3) of the same Act and, consequently, their Lordships sentenced each of the appellants to five years' imprisonment with effect from the dates of their arrests. I am now requested to follow the decisions of the Supreme Court in the above mentioned cases. It goes without saying that as Lam was not very specific in her treatment of the term cannabis, an inference most favourable to the accused persons must be adopted (*Tai Chai Keh v. P.P.* [1948-49] MLJ Supp. 105.). In my judgment, the term cannabis as adverted to by Lam could refer to Indian Hemp and that being the case, I have no choice but to construe it as such. The accused persons are entitled under the law to take advantage of any imperfection in the prosecution's case, after all the duty of the prosecution throughout the trial is to prove its case beyond reasonable doubt.

Section 158(i) of the Criminal Procedure Code ("CPC") empowers the High Court to alter or add to any charge at any time before judgment is pronounced. Though Spenser Wilkinson J in *P.P. v. Heng You Nang* [1949] MLJ 285 was of the view that it was not imperative on the part of the Court to amend or alter any charge, yet I am of the considered view that s. 158 of the CPC clearly allows amendment to be made before judgment is given and, preferably, if done at the end of the prosecution case (see for instance *P.P. v. Tan Kim Kang* [1962] MLJ 388). In the circumstances, following the decisions of the Supreme Court in the above mentioned cases, the charge against both the accused persons was amended to one of possession under s. 12(2) of the Act read with s. 34 of the Penal Code and punishable under s. 12(3) of the Act. By virtue of s. 158(ii) of the CPC, the amended charge was accordingly read and explained to both the accused persons. I might as well mention that the consequences are extremely grave if the requirements in s. 158(ii) of the CPC are not complied with (*Lim Tuan Hong v. Jebesen* [1985] 4 Ky 79 and *Singah Mohamed Hussin v. PP* [1973] 2 MLJ 109).

The first accused pleaded guilty to the amended charge and understood the nature and consequences of his plea and he was convicted thereof, whilst the second accused claimed trial and gave a statement from the dock. In his unsworn statement from the dock, the second accused briefly stated that in April 1992 at about 6.30 p.m. he was requested by Chong Wai Kheong to hand a package to the first accused without being told as to its contents. In due course, the second accused handed that package to the first accused and even though the second accused asked the first accused as to its contents, no reply was forthcoming from the first accused. Adverting to the incident on 5 May 1992, the second accused brought him in a motor car to meet Chong Wai Kheong and upon arrival at the Mardec latex collection hut, there was no sign of Chong Wai Kheong. The first accused then drove the car to town and about ten (10) minutes later, on their return to the Mardec latex collection hut, they saw a car with a Malay and a Chinese in it. The first accused was seen leaving the place with the Malay in a motorcar and about five (5) minutes later, upon their return, the Malay man arrested him. He was then taken together with the first accused to Sungai Siput police station where ASP Badaruddin lodged a police report. He was then taken to another office and it was there that he saw a black bag on the table.

- a** It is now trite law that the Court has to consider the statement of the second accused from the dock. In assessing its weight, the Court must not lose sight of the fact that statement was not tested through cross-examination and that the second accused has not been sworn in or affirmed (see *Ip Ying Wah v. PP* [1958] MLJ 34). I have given due consideration to the statement of the second accused from the dock and in doing so I have perused through the report prepared by Busra
- b** which was put in the project file in respect of the events that took place on 25 March 1992, which report was marked as a defence exhibit D14, with particular emphasis on the underlined portions in red (see a separate judgment on this point reported in [1994] 4 CLJ 750). Exhibit D14 was microscopically examined in order to ascertain whether the character known as Chong Wai Kheong existed or not and clearly from exhibit D14, Chong Wai Kheong was not in existence. It must be borne
- c** in mind that before exhibit D14 was marked as a defence exhibit, the defence mercilessly cross-examined Busra to show that Chong Wai Kheong was a real character and was in existence on 25 March 1992. But on the production and the marking thereof of the report as exhibit D14, such an allegation was totally unfounded and indeed mischievous, to say the least. It is the finding of this Court that Chong Wai Kheong is an imaginary and non-existent character coined up by
- d** the defence. It is also the finding of this Court that the second accused was in possession of 480 grammes of cannabis (Indian Hemp) under s. 12(2) of the Act in furtherance of a common intention with the first accused and punishable under s. 12(3) of the Act. Having seen and heard the second accused and having considered his statement from the dock in its entirety as against the prosecution evidence, I could not believe him. The second accused was trying to portray himself out as
- e** an innocent bystander caught in the web of the criminal activity of the first accused. The second accused was not gullible; he knew what the first accused was doing all along. The conduct of the second accused in the previous second transaction as stated in the early part of this judgment showed knowledge on the part of the second accused as to the nefarious activity of the first accused and I so hold accordingly. By necessary inference the second accused had common intention to commit the offence with the first accused and that would, by itself be
- f** sufficient to import liability on him. I have no choice but to convict the second accused on the amended charge.

- In regard to sentence, I am entitled to impose similar sentences on each of the accused persons (*Kenneth John Ball* [1951] 35 Cr. App. R.164). The question of public interest, the character and background coupled with the circumstances and the manner in which the offence was committed, the need to strike a reasonable balance between the interests of the public and the interests of both the accused persons, the question of deterrence to both the accused persons and to would be offenders, the rampancy of the offence, and the plea in mitigation are but some of the factors that I took into consideration before imposing sentence on both the accused persons (see *Mohd. Jusoh bin Abdullah v. PP* [1947] 13 MLJ 131, *Reg v. Curran* [1973] 57 Cr. App. R. 945). Consequently, each of the accused persons was sentenced to five (5) years' imprisonment with effect from the dates of their arrests (5 May 1992). All the exhibits were ordered to be kept by the Court pending appeal, if any.

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